IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

C. SCHWARTING, Master and Claimant of the German Barque "ROBERT RICKMERS," her tackle, apparel and furniture, *Appellant.*

vs.

THE STIMSON MILL COMPANY, a corporation, *Appellee.*

No. 1119

BRIEF OF APPELLEE

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STATEMENT OF THE CASE.

The facts out of which this controversy grows, as shown by the record of the case, may be briefly stated as follows:

On the afternoon of December 25th, the tug "Tacoma," having in tow the German barque "Robert Rickmers," was proceeding from Port Townsend to the part of Tacoma. The "Rickmers" is a barque of 2277 tons, gross tonnage,

and was in ballast. The weather was stormy and squally, and heavy head winds were encountered. On account of the condition of the wind and weather, night approaching, in the judgment of the master of the tug, it became unsafe to attempt to continue the voyage to Tacoma. He accordingly sought an anchorage in Shilshole Bay, where, at the time, there lay at anchor the schooners "Mildred," "Corona" and "Stimson." The "Mildred" and the "Corona" were each of about 400 tons burden, and were anchored about a quarter of a mile apart. The "Stimson," a schooner of 700 tons burden, was anchored about a half mile further off shore. She had already taken on about two-thirds of her cargo, and was at the time riding upon her port anchor, with about 105 fathoms of chain. The "Rickmers" was taken by her tug to a berth about midway between the "Mildred" and the "Corona," and further in shore. She cast off her towing hawser and dropped her port anchor, running out about 45 fathoms of chain. The compressor was made fast upon the chain, but when the bark, drifting with the force of the wind then blowing, took up the slack of her chain, the sudden strain caused the compressor to break. The windlass at first was unable to hold the chain, and ten or fifteen fathoms of additional chain ran out. The momentum of the barque was then so great that she continued to drift, dragging her anchor, until she had come down to the "Corona," almost coming into collision with the latter schooner. She was then overtaken by the tug, which again made fast to her and towed her back to a second anchorage, near the position of her first anchorage, but a little further in shore. When the tug made fast to her, the crew of the barque hauled in about fifteen fathoms of her port chain and then made it fast, thenceforth having but forty fathoms of chain out on her port anchor. The port anchor was not sighted to see whether it had fouled, or become broken or impaired by

the strain which had carried away the compressor. She was towed back to her second anchorage, a distance of about 1100 or 1200 feet, her port anchor dragging upon the bottom. In coming to anchor a second time her starboard anchor was dropped with thirty fathoms of chain. After dropping the starboard anchor, the port anchor was not hoisted to see whether it had become fouled or injured in dragging upon the bottom back to the second anchorage. An examination of the positions, as shown upon the chart, will disclose that the port anchor must have been trailing aft over the port bow. The direction from the "Corona" to the anchorage of the "Rickmers" was southwesterly. The winds and squalls varied from southeast to southwest. At the time the "Rickmers" was coming to anchor they must have been blowing from the southwest in order to carry her toward the "Corona." The physical facts disclose that after the "Rickmers" came to anchor the second time she was necessarily riding entirely upon her starboard anchor.

There is no material conflict in the testimony in respect to the relative positions of the four ships at anchor in this bay. Their positions were located approximately upon one of the Government charts introduced in evidence. The witnesses have variously estimated the distance between the several ships, but they substantially agree in locating their relative positions as shown on this chart. The "Rickmers" was about equally distant from the "Mildred" and the "Corona," and this distance was between 1100 and 1200 feet. She came to anchor between four and five o'clock P. M., and she was left by the tug after the second anchorage at about five o'clock. According to the testimony of Mr. Salisbury, the officer in charge of the United States weather bureau at Seattle, the wind at this time had a velocity of sixteen miles per hour from the

southeast. . The highest velocity, between four and five o'clock P. M., was eighteen miles per hour. In describing the direction of the wind during this hour, he said:

"It was from southeast to south, a part of the time from the south—about one-half of the time from the south and about one-half of the time from the southeast; a few switches to the southwest for a minute at a time."

(Printed record, p. 527.)

Thereafter the velocity of the wind diminished until seven P. M., when it was fourteen miles per hour. At eight o'clock the velocity was twenty miles per hour. The wind blew mostly from the southeast, but varied occasionally to south and southwest. At 10:35 the wind had attained a velocity of twenty-two miles per hour from the southeast, and during the five minutes preceding eleven o'clock P. M. it increased to twenty-four miles per hour. During the next twenty-five minutes the wind gradually diminished to twenty miles an hour, and then, in the language of Mr. Salisbury, "increased again to twenty-four between 11:25 and 11:35, twenty-four miles; that was from the south to the southwest; between 11:25 and 11:30 the wind was mostly from the southwest, and from there until midnight it was mostly from the southwest, increasing to a maximum velocity of thirty-three miles an hour between 11:32 and 11:40—with a maximum velocity of thirty-three miles per hour, with an extreme of thirty-five miles an hour for one minute.

Q. At what time was the extreme of thirty-five miles per hour reached?

A. The time of the extreme thirty-five miles per hour for one minute was 11:38 to 11:39."

(Printed Record, p. 531.)

After the port compressor had broken, a relieving tackle was used to take the strain off the windlass. This relieving tackle was made fast at one end to the mast, and at the other to the anchor chain, by means of an iron hook about an inch and a half in diameter. About eleven o'clock P. M. it was discovered on board the "Rickmers" that this hook had broken, and that the barque was dragging. She bore down toward the "Mildred," lying northwesterly from her, and carried away the "Mildred's" jibboom. After clearing her, she continued to drift. The weather was partly cloudy and the wind and rain came in squalls, varying from southeast to southwest. As appears more clearly by reference to the chart showing the location of the different ships, the "Stimson" lay in a direction northeasterly from the "Mildred." After clearing the "Mildred" the "Rickmers" continued adrift, dragging her anchor for about a half hour, when she came into collision with the "Stimson." The only reliable testimony by which we may fix the precise time of the collision is that of Richard Sennin, mate of the "Stimson," who says that he was called by the watchman at 11:40 and came on deck immediately, just in time to witness the collision. (Printed Record, p. 185.) As shown by the testimony of Mr. Salisbury, during the preceding five minutes the wind was blowing a gale of from thirty-three to thirty-five miles an hour from the southwest, which accounted for the unusual and erratic course of the "Rickmers." The masts and rigging of the "Rickmers" locked with the "Stimson" in a fast embrace. The port anchor of the "Rickmers" had carried away, but when cannot be determined from the testimony. After escaping from the "Mildred" her crew were engaged in an endeavor to again make fast the relieving tackle upon the port anchor chain, without discovering that the anchor was gone, and also paid out more chain on the starboard anchor; but the momentum of the

ship before the wind was then so great that she continued to drag. After colliding with the "Stimson" the latter's anchor was not sufficient to hold against the added weight and momentum of the "Rickmers," and the two vessels, locked together, dragged northerly along shore, a distance of seven or eight miles, until the wind abated and the vessels were separated, when their anchors held them. This proceeding was instituted to recover for the damages thus sustained by the "Stimson."

BRIEF AND ARGUMENT.

I.

The principal error relied on by appellant arises upon the allowance by the Court of the sum of $5,000 for permanent damages to the "Stimson" in excess of the cost of repairs. This claim was urged by libelant in the court below, upon the ground that the cost of the repairs placed upon the ship did not measure all of the actual damages sustained by her in consequence of the collision. As has been shown, the masts and rigging of the "Rickmers" became locked in the masts and rigging of the "Stimson" so firmly that for several hours the two vessels were driven before the gale, each dragging its anchor. The force of the collision was necessarily a violent one. The "Stimson" had already taken on board a cargo of 650,000 feet of lumber. The jib-boom and masts and rigging were either broken or damaged so as to become useless. The keelson was split for a length of sixty feet. The vessel was wrenched and twisted until the oakum had started out of her sides. She was a new vessel. To have repaired her so that her condition would have been as good as before the collision would have involved a disproportionate expense and delay. Such repairs only were made as were deemed

practicable and prudent and would render her fit for service; and recovery was sought for the remainder of the damages as permanent injuries. This was not only the most practicable course, but the one involving the least loss to appellant, because it would lessen both the claim for damages to the ship and for demurrage for her detention.

In support of their asignment of error upon this question, proctors for appellant cite and rely upon certain decisions denying a recovery for damages in excess of the cost for repairs. In all these cases the decisions are upon the ground that the proofs render the claim speculative and uncertain.

In the case of Petty v. Merrill, 9th Blatchf. 447, cited in apellant's brief, the facts quoted in the opinion of the Court entirely justify the conclusion it reached. With the application of the governing principles of law to the facts of that case, we make no controversy. The rule for which we contend, however, is recognized by Judge Woodruff in that case. He says:

"There may be proof of injury which, though known, cannot be repaired without unreasonable cost, where the party in fault will be benefited by an allowance for actual depreciation, because an attempt to make complete repairs would involve an expense greatly disproportionate to the amount of such depreciation."

What is said above is likewise true of the case of The Excelsior, 17 Fed. 924. The denial of permanent depreciation was based upon the ground that the Court was satisfied that after all the repairs made on her, she was in as good condition as before the injury. The same comments may be made upon the case of Sawyer vs. Oakman, 7 Blatchf. 290. The opinion of the Court rests upon the fact that "The commissioner reports that the schooner,

by the repairs put upon her, was restored so as to be as strong as she was before the accident, and that she was thereby rendered as favorable to her owners for their own use and employment as she was before." Under these circumstances, the question whether she would sell for as much, was purely speculative and problematical. The Court does not deny the rule that recovery may be had for permanent injuries over and above the cost of repairs, but simply denies the application of the rule to the facts of that case. On the contrary, the rule itself is recognized by the Court when it says:

"I have, in one case of collision, made an allowance for depreciation over and above the loss of use of the vessel and the necessary expenses of repairing, etc. But such allowance should only be made upon proof that is clear, and that furnishes a safe guide in determining the amount."

The statement in appellant's brief that Sawyer vs. Oakman is cited as an authority by the United States Supreme Court, is misleading. In the case of Smith vs. Burnett, 173 U. S. 433, referred to, the citation is upon a wholly different point.

The quotation in appellant's brief from The Favorita, 8 Blatchf. 539, is both misleading and incorrect. That case recognizes the rule for which appellee contends. What the Court really said upon the subject in that case is as follows:

"The owner of the injured vessel may recover the cost of repairing her. If the cost of such repairs can be clearly and reliably shown, he may have such recovery, whether the repairs have been actually made or not. He may repair his vessel fully so that she shall be actually as good as she was before the injury, and be indemnified by his recovery. If his vessel be wholly lost, or so injured that she cannot be repaired except at a cost greater than her

value, he may recover her value; and there may, possibly, be a case in which complete repairs cannot be made, in which intrinsic and inevitable diminution of value could be estimated and safely allowed. But that alleged depreciation in the market, which is said to result from the mere fact that a vessel has once been injured and repaired, depending upon prejudice or apprehension, when, in truth, the intrinsic value of the vessel is made good, is indefinite, uncertain and variable. The estimate thereof will depend upon the fears or caprices of proposed purchasers, and will fluctuate according to the fancy or imagination of witnesses."

Again, appellant is in error in saying that the case of The Favorita went to the Supreme Court *on the whole record*, and was affirmed in the 18th Wallace, 598. On the appeal to the Supreme Court, The Favorita was the sole appellant, and the only questions presented were those of negligence and demurrage, the question of the right to recover damages for permanent injuries not being involved before the Supreme Court.

The case of The Osceola, 34 Federal 921, recognizes the rule of law contended for by appellee. The evidence is not set out either in the opinion or in any statement of facts in that case, and hence it cannot be said to be an authority for or against either of the parties to this controversy.

The quotation contained in appellant's brief from the case of The Isaac Newton, 4 Blatchf. 21, discloses that the opinion in that case is of no controlling importance in the determination of this controversy. The claim for permanent injuries was based upon the mere opinion of the master and mate, which did not rest upon any sufficient facts. The shipmaster who repaired the ship testified that "she was thoroughly repaired and was put in as good condition as before the injury." The whole value of the vessel before

the injury was only $2,500, while the cost of repairs was more than $1,800. The Court said:

"After this amount of expenditure, I am inclined to agree with the shipmaster that she must have been in as good a condition as before the injury, and shall accordingly disallow the claim of $800."

The statement in apellant's brief that the Supreme Court has sustained Judge Nelson's ruling in the case of The Isaac Newton "as to conjectural and speculative damages," is again misleading and incorrect. In the case of The Isaac Newton two questions were involved—one a claim for permanent injuries and the other a claim for demurrage.

The case of The Conquerer, 166 U. S. 128, involved the question of demurrage, and the case of The Isaac Newton was cited in the consideration of that question only.

The same is true of the case of The R. L. Maybey, 4th Blatchf. 439, and Sturgis vs. Clough, 1 Wallace 269.

Proctors for appellant claim to have quoted in their brief all the testimony offered upon this point. In this, however, they are mistaken. They have omitted some very material testimony.

Appellee offered in evidence the testimony of Robert Moran, the head of the Moran Ship Building Company, one of the most capable and experienced ship builders in the United States, and that of Captain H. K. Hall, the head of the Hall Bros. Marine Railway & Ship Building Company, a ship builder of fifty years' experience, and widely known throughout the entire Pacific Coast.

Mr. Moran, after having testified to making a survey and appraisement of the injuries to the ship caused by the collision, gave the following testimony:

"Q. You state in that report that you estimate the damages to the ship of $8,500, and $1,000 for discharging and reloading the lumber in the ship. I will ask you what you have to say as to whether that is a reasonable and fair estimate of the damages to the ship and the expense of unloading and reloading?

A. Well, that is a reasonable estimate for the cost of repairing the ship, as well as she could be repaired. *I do not really consider that it makes the ship as good as she was before she was injured.*

* * * * * * * * *

Q. What, in your opinion, would be her damages, then, after being repaired as fully as would be practicable, in accordance with your survey and in excess of the cost of making such repairs?

A. The damages this ship sustained and the depreciation, after the repairs had been made in accordance with these specifications, I should judge would be probably ten per cent.

Q. In other words, her permanent damages, which could not be overcome by any repairs put upon her, would be ten per cent. in addition to the cost of repairing her as fully as she could be repaired?"

A. That is my judgment."

(Printed Record, pp. 155-156.)

He then fixes the amount of permanent damages at $6,000.

Captain Hall, after testifying that he had made a survey and appraisement of the cost of repairs to the ship, gave the following testimony:

"Q. I will ask you to state whether the repairs of the ship as contemplated by this report and appraisement would put the ship back in the condition that she was immediately before the collision which caused these damages?

A. It would not.

Q. Well, why not?

A. *Because the strain that had been put upon the vessel, the wrenching and the twisting that was caused by the collision, had damaged that vessel to an extent that could not be replaced by any repairs that could be put upon her.*

Q. Would that affect the life of the ship?

A. It would take the vitality, I should say, of at least 10 per cent. out of the vessel.

Q. Now, after making the repairs contemplated by that survey, how much, if any, would you say that that ship was worth less than it was immediately before the collision which caused these damages?

A. Well, I should say about $6,000."

(Printed Record, pp. 164-165.)

Cross-Examination.

Q. You say that you estimate the permanent damages to this schooner at ten per cent.?

A. Yes, sir.

Q. Well, was there anything strained or broken about the vessel or the hull of the vessel?

A. There was something that was remarkable, that showed a tremendous strain that had been wrought upon that vessel; the masts from the deck down to the keelson, where it was stepped into the keelson, had been strained; a severe strain that came upon the masts had split the keelson for the length of 60 feet and it was ruined.

Q. Did you renew that?

A. Yes, sir.

Q. That is included in your bill, is it?

A. Yes, sir.

Q. Now, after you renewed them did not that make her as strong as before?

A. It made her as strong as before, that portion of the work fully as strong as before.

Q. And that would apply as to the other repairs that you made, would it not?

A. All the other repairs, yes.

Q. Be just as good as they were before?

A. As far as the repairs were concerned, but it don't relieve the vessel from the strain.

Q. Well, was the vessel wrenched any?

A. *Yes, sir.*

Q. *Twisted?*

A. *Of course, necessarily must be.*

Q. *Well, was she?*

A. *Certainly, she was.*

Q. Well, in what way, outside of the keelson, that you spoke of?

A. *Oh, the general strain: she showed it by the oakum that had started out of her sides, necessitating recalking her all over.*"

(Printed Record, pp. 170-171.)

Proctors for appellant in their brief, page 15, say:

"There is not a single word in it [the testimony] which shows or tends to show that complete repairs were not made. The entire sum expended, for which the court below allowed damages in full in the sum of $9,388, is in itself sufficient to warrant the belief that neither the owners nor the builders stinted themselves in any particular in making these repairs."

As a matter of fact, this sum was allowed by the court "for expenses paid for repairs, and for unloading and reloading, and necessary expenses of the ship during seventy-four days of detention."

In the case of the schooner Transit, 4th Ben. 138, an allowance was made of damages for permanent deterioration. In that case, Mr. Justice Blatchford said:

"As to the first exception, the item of $500 for 'permanent damage or deterioration' must, I think, be allowed. Williams, who built the pilot-boat, and who also repaired her, fixes her permanent deterioration at that amount, at least. She was only five months old, and the Commissioner appears to have adopted the lowest sum testified to by any witness. The weight of the evidence is decidedly with the allowance of the item."

In the case of The Helgoland, 79 Fed. 123, such an allowance was likewise made. In that case the Court said:

"It seems to me manifest from the nature of the case, as well as from the testimony, that a boat thus sprung and twisted has not the endurance or the life of a boat not thus strained and out of shape. The qualifications in Mr. Pierce's testimony, reading it all together, show, I think, that what he means is, that for present actual use she has all-sufficient strength to sustain contacts and collisions as before; but that she was built with a considerable surplus of reserve strength, which does not remain in the same degree as before. * * * The allowance here is not on the vague notion that she is not as good, or will not sell for as much, simply because she has been in collision, when everything discoverable has been apparently rectified and repaired. Here what remains is palpably not repaired, and could not be without great expense. This boat was one of the finest of the kind ever built, costing about $21,000 a few months only before the accident. An allowance of between 8 and 9 per cent. for the inferior value and enduring power of the boat is, it seems to me, a fair and moderate allowance, of which the defendant should not complain."

According to the testimony of the witnesses, the schooner "Stimson" was wrenched and twisted to such an extent that the oakum had started out of her sides. It is clear from the testimony of Mr. Moran and Captain Hall, that it was not contemplated by them that the repairs sug-

gested in their survey and report would restore the schooner to her condition prior to the collision.

In the case of M'Ilvaine, 126 Fed. 434, where damages for permanent injuries were allowed, it is said by the Court:

"This defective condition alone, which no effort was made to remedy, on account of the expense incident to the same would justify the allowance made by the commissioner, and the proof is that it affects the sale value of the barge $2,000. It was understood at the time of the repairs that the work done was by no means sufficient to place the barge in the condition she was before the collision, and that from four to five thousand dollars would be necessary for that purpose, which sum the owner was unwilling to expend, not knowing to whom the fault of the collision would be attributed; and only such amount as would place the barge in a safe and seagoing condition was expended."

II.

ALLOWANCE OF INTEREST.

Interest was computed and allowed in this case from the 25th of March, 1902, which was after the completion of all repairs, and after all costs and expenses had been incurred and paid. Interest could perhaps properly have been allowed on some of the items from an earlier date, namely, from the date when any expenditure or payment was actually made. The delay in the ultimate determination of this case was solely for the convenience and accomodation of the appellant and his proctors. After the decision by the Court on the merits, the case was further delayed by a motion for rehearing interposed by proctors for appellant, and hence a decree was not entered in this cause until November 7, 1904, nearly three years after the date of the collision. Whatever this appellee was entitled to recover was due it at least as early as the 25th day of

March, 1902, the date from which interest is computed; and the issue of this proceeding discloses that from that date this sum was wrongfully withheld by appellant. Appellee cannot, therefore, be fully compensated without the allowance of interest.

It is true, as has been held by this Court in Burrows vs. Lownsdale, 133 Fed. 250, that the allowance of interest is a matter for the discretion of the Court; but this is true in the sense that its discretion is to be exercised in determining whether an added sum by way of interest is necessary to make complete compensation. Interest is not allowed, as claimed by appellant's proctors, in the way of punitive or quasi-punitive damages. Its allowance proceeds entirely upon the theory of compensation; and this is not affected by the question whether the loss is partial or total. In support of these views see,—

The America, 11 Blatchford 485.
The Morning Star, 4th Bissell 62.
The Baltic, 3 Benedict 195.
The Bulgaria, 83 Federal 312.
The Illinois, 84 Federal 697.
The Oregon, 89 Federal 520.
The John H. Starin, 116 Federal 433.
The Mahanoy, 127 Federal 773.

In The America, 11 Blatchford, *supra*, it is said:

"Where the value of the thing lost, or the cost of repairs and the like, are the test or measure of recovery, and the amount of damages becomes mere matter of computation, interest is necessary to indemnity as the allowance of the principal sums. But, if the allowance of interest rests in discretion, still, the indemnity of the party for injury from a collision occurring through the fault of another vessel, should be the object of the Court in the allowance of damages. In this view such allowance was, I think,

proper. It is, in such case, not allowed as punishment. It is not like the allowance of punitive damages in actions of slander, assault and battery, and like cases. It gives indemnity only."

In The Illinois, 84 Federal, *supra*, it is said:

"The sum called interest added to the $5,000 was necessary to make full compensation at this time. It is not strictly interest—which is due only for the withholding of a debt—but the compensation for the permanent injury to the vessel was due as of the time when it was inflicted, and the addition of what is called interest is justly added for withholding it. If the respondent's position in this respect were sound, no compensation on this account would be due until such time as the vessel might be sold. It is not sound, however: $5,000 of the value of the vessel, as the commissioner has found, was destroyed by the collision, and the libelant was thus deprived of this amount of his property. He was justly entitled to be paid for it when deprived of it, and such payment being withheld, the usual compensation for the withholding of a debt is the common method of compensating for the withholding of damages due for a tort."

III.

DEMURRAGE.

At the time of the collision, the schooner "Stimson" was engaged in carrying lumber from Ballard to the port of San Pedro, in which trade she had been engaged ever since her construction. She was at the time under charter to carry the cargo then being loaded, at the rate of $7.00 per M. Her average time for the completion of a voyage was sixty days; and the time lost by reason of this collision was ninety days. The evidence did not disclose, as suggested by proctors for appellant, that other vessels were engaged in this particular trade between the ports named, and no expert or other testimony was given in re-

spect to any customary or fixed market price for the charter of vessels generally engaged in the same carrying trade.

Libelant introduced evidence not only of the particular charter then in hand, but of the net earnings of preceding voyages. The criticism suggested in appellant's brief, respecting the proofs of the expenditures of libelant's vessel during the time she was laid up for repairs, is wholly unjustified. The receipted bills and itemized vouchers for the expenditures were introduced. Some of the items involved in this controversy were contained in bills or vouchers that embraced the entire expenditures of the month of December, hence it became necessary to introduce these vouchers; but ample and clear explanation was made of each voucher, and every item appearing in any voucher not properly chargeable as an expense arising out of or incident to this collision was pointed out and excluded from the libellant's claim.

Even if there were merit in the contention that the market price for the use of such a vessel is the best and most satisfactory evidence, still it is submitted that, the evidence offered by libelant being the only evidence upon the subject, the objection of appellant must fall. The evidence was at least competent, if not the most satisfactory or conclusive, and, standing alone in the case, the Court must accept it and be governed by it in determining the damages of appellee for the wrongful detention of its schooner.

But this evidence is competent; indeed, it offers, under the facts in this case, the most complete and accurate mode of ascertaining the actual damages suffered by appellee for the loss of the use of its vessel occasioned by the collision. It is not problematical, speculative or uncertain; it measures exactly the loss sustained. The intro-

duction of this character of testimony is abundantly sustained by the authorities.

Williamson vs. Barrett, 13 Howard 101.
The Potomac, 105 U. S. 631.
The Bulgaria, 83 Federal 312.
The Belgenland, 36 Federal 504.
The Margaret Sanford, 37 Federal 148.
The State of California, 54 Federal 404.

The latter case was decided by this Court and must now be held to establish the rule for its guidance in the determination of this question. In that case, this Court said:

"While the evidence in this case does not contain opinions or estimates of the value of the use of the steamship during the time of her detention of persons having knowledge qualifying them to testify as experts, it does show the facts as to the number of days lost while the damages caused by the collision were being repaired, and shows the average daily earnings of the vessel for a period extending from six months prior to, to the end of six months subsequent to the date of the collision, from which the court could as well determine the capacity of the ship and the condition of the trade in which she was then engaged, and make a fair estimate of the value of her use during the time of her detention, as from expert evidence. The fact that another vessel belonging to the same owner was used as a substitute for the disabled steamer during the time of her detention should not militate against the right to compensation, nor afford just cause for awarding less than would be allowed if the owner, from lack of enterprise or inability, failed to have an available substitute for use in such an emergency. Upon consideration of the evidence, we are satisfied that the amount allowed for demurrage is reasonable."

IV.

PRESUMPTION OF FAULT.

What is said by proctors for appellant in the separate discussions of the fifth and sixth asignments of error may be considered together. They present but a single question of law. According to the proofs in this case, the "Stimson" was riding securely at her anchor. The "Rickmers" broke from her moorings and drifted down upon her, causing the injuries complained of. Under these facts, the burden is upon the "Rickmers" to show affirmatively that the collision was the result of inevitable accident or a *vis major*, which the exercise of proper precautions and good seamanship on her part could not have prevented.

The Louisiana, 3 Wallace 164.
The Fremont, 3 Sawyer 571.
The Brig Beaver, 2 Benedict 118.
The A. R. Wetmore, 5 Benedict 149.
The Schooner Duchess, 6 Benedict 48.
The Severn, 113 Federal 578.
The Andrew Welch, 122 Federal 557.

There is nothing in the Laws of Oleron or the Ordinances of Wisbury in conflict with the rule above announced. It is true they recoginze the doctrine that the consequences of an inevitable accident, not resulting from the fault of either party, must rest where they fall, but this is not alone the rule of the admiralty. The quotation in appellant's brief from the Black Book of the admiralty presents no different rules of law than those above stated.

V.

THE FAULT OF THE "RICKMERS."

The eighth and ninth assignments of error may be discussed together. They involve but one question, the fault of the "Rickmers." Applying the rules of law above announced, the "Rickmers" has manifestly failed to excuse herself from fault. And her fault is not limited to a single act of negligence. In her first attempt to anchor she met a misadventure, which, in view of the state of the weather, should have cautioned her officers in respect to the dangers of the anchorage, and the necessity of extra precautions if she saw fit to renew her attempt to anchor at the same place. After she had dragged her anchor for more than eleven hundred feet, and barely avoided a collision with the "Corona," she permitted herself to be taken back approximately to the same place for a second anchorage, without sighting her port anchor to see whether the anchor or chain had been damaged or fouled. While being towed back she allowed her port anchor to drag upon the bottom over a distance of eleven or twelve hundred feet. In such a manoeuvre, while proceeding back over the course upon which she had drifted, her chain was exceedingly likely to foul in the flukes of the anchor, and thus to wholly destroy the usefulness of the port anchor. After she had come to anchor a second time and was riding upon her starboard chain, she should, before permitting the tug to depart, have hoisted her port anchor and examined it to see that it was clear and uninjured. She should also have required the tug to swing her bow so that her port anchor could be again dropped in such a position as to give a proper spread to the chains of her two anchors. Instead of observing these precautions, her port anchor was permitted to remain in the position in which it was left

after the ship was towed back. In other words, it must necessarily have been trailing aft. In this position the ship would be held entirely by the starboard anchor until such time as it dragged sufficiently for the ship to fetch up on its port chain. Only thirty fathoms of chain was paid out on the starboard anchor, and forty on the port. In view of the disabled condition of the port windlass and the destruction of the compressor, the "Rickmers" was not justified in placing much reliance upon her port anchor. It was made fast by a relieving tackle attached to the chain by an open iron hook not more than an inch and a half or an inch and three-quarters in diameter. Under all these circumstances, extra precaution was required in the selection of a place of anchorage and in the use of the starboard anchor. In view of the size of the "Rickmers," the fact that she was in ballast, and the character of the weather, more than twice the scope of chain should have been paid out on the starboard anchor in the first instance; and as the storm increased additional scope should have been given. If these precautions had been taken, it cannot now be presumed that she would have broken from her moorings. The other ships in the harbor rode securely at their anchors. It is claimed by appellant that the "Corona" dragged her anchor. This does not clearly appear from the testimony. The captain of the "Corona" testifies that after the "Rickmers" had begun to drag the officer on the deck of the "Mildred" sung out to him that his ship was dragging, whereupon he paid out more chain, and his ship held. It is quite probable that the suggestion that the "Corona" was dragging was an inference drawn solely from the fact that the "Rickmers" was changing her position; but in any event, the "Corona" weathered the storm, and at least did not drag at all after further chain had been paid out. According to the testimony of Mr. Salisbury, the wind did not exceed from twenty to

twenty-five miles an hour at the time when the "Rickmers" must have first begun to drag. The only time when the storm was one of unusual violence, was during the five minutes immediately preceding the collision with the "Stimson."

But the excuse is offered by appellant that the "Rickmers" could not pay out more chain upon her anchors because there was not sufficient freeway between her and the "Mildred" and "Corona." If the Court will take a pair of dividers and measure the distances on the Government chart, it will discover that the space between the "Rickmers' and each of these vessels was more than eleven hundred feet, ample room to give abundant additional scope to her chains. But if it be assumed that the space was insufficient, the "Rickmers" cannot be excused from fault. In the language of the court below,

"The excuse offered for not paying out more cable than forty fathoms on the port anchor, and thirty fathoms on the starboard anchor, was that greater length of chain would have caused the "Rickmers" to swing dangerously near the "Mildred" and the "Corona." This proves that inexcusable error was committed in choosing the place of anchoring, and the captain of the "Rickmers" in his testimony claims that he was not satisfied with the location, but dropped anchor at the place indicated by the captain of the tug, who it is insisted must be held responsible as a local pilot. This, however, does not relieve the "Rickmers" from legal liability. She is answerable for damages caused by the inexcusable errors of whoever for the time being had control of her movements, whether in the capacity of master, chief mate, or local pilot."

(Printed Record, pp. 574-575.)

When the "Rickmers" came to anchor the second time there were known indications of the danger of drifting, in view of the character of the anchorage and the condition

of the weather. Ordinary prudence required that her officers should take extraordinary precautions.

The Anerly, 58 Federal 795.
The Sharpee She, 60 Federal 925.
The Sapphire, 11 Wallace 164.
The Energy, 10 Benedict 158.

A number of cases are cited in appellant's brief, in which different courts have held upon the facts involved in the respective cases, that the collisions were the result of inevitable accident. These authorities can no more assist the Court in the determination of this case than would the citation of cases by appellee, in which the courts have held that collisions were not attributable to a *vis major* or an inevitable accident; and hence we forbear to thus burden this brief.

VI.

The first, second, third, fourth and tenth assignments of error are discussed together by appellant. They involve his contention that the "Stimson" was guilty of fault contributing to the collision. In case of a collision between two anchored vessels, one of which dragged its anchor, while the other did not, the rule of law is that the latter is presumed to have been free from fault.

The Serena, 113 Federal 578.
The Mary Frazer, 26 Federal 872.
The Anerly, 58 Federal 795.
The Carl Konow, 64 Federal 815.
The Schooner Duchess, 6 Benedict 48.

In this case the "Rickmers" is clearly shown to have been guilty of several distinct and separate faults, each of which was adequate to account for the collision.

"Where one vessel, clearly shown to have been guilty of a fault adequate in itself to account for a collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault, and this principle is peculiarly applicable to a vessel at anchor."

The Oregon, 158 U. S. 186.

Not only has the "Rickmers" failed to overcome this presumption in favor of the "Stimson," but, on the other hand, it clearly appears from the evidence that the latter was without fault. She was riding securely with one anchor upon one hundred and five fathoms of chain. A watchman was on deck. The weather was partly cloudy and the wind and rain came in squalls. It is urged that the watchman should have discovered the danger of collision in time to have called his superior officer, so that the "Stimson" might have taken some action to avoid the collision. But it should be remembered that the "Rickmers," when she first dragged her anchor, proceeded in a northwesterly direction toward the "Mildred." The wind was shifting from southeast to southwest. The course of the "Rickmers," after passing the "Mildred," must necessarily have been an exceedingly erratic one. If the watchman upon the deck of the "Stimson" had discovered that the "Rickmers" was adrift, he could not have anticipated that her course would bring her into collision with the "Stimson" until the violent gale came on from the southwest during the last five minutes before the collision actually occurred.

It is suggested that the "Stimson" might have hoisted a sail and thus have swung free from the "Rickmers." The deck of the "Stimson" had been cleared for the purpose of taking on a cargo of lumber; but even had not this been so, such a manoeuvre would have been one of great hazard.

In view of the erratic course of the "Rickmers," the hoisting of a sail upon the "Stimson" would have been quite as likely to throw her athwart the course of the "Rickmers" as to clear her. Besides, the violence of the gale, after it could have been ascertained that a collision was probable, was such as to render an attempt to hoist a sail impracticable, if not impossible. No such attempt was made upon the "Rickmers," and it cannot, therefore, be urged that the failure to do so on the part of the "Stimson" was a fault.

The claim that such an attempt by the "Corona," in the afternoon was a success, offers no parallel. When this was done it was still light, and only a moderate wind was blowing. The course of the "Rickmers" does not then appear to have been shifting. Neither did the "Rickmers" bear down upon the bow of the "Corona," as she did upon the bow of the "Stimson."

What is said in the opinion of the trial court on this subject may be here quoted with profit:

"The captain of the "Rickmers," in his testimony, blames the "Stimson" for failure to put her helm hard-a-starboard. He appears to think if that had been done the collision would not have happened. It is my understanding that a vessel cannot be made to change her position by use of her helm when she does not have steerageway, and the testimony of the captain does not directly controvert this principal of natural philosophy, nor does he assign any reasons for supposing that if the "Stimson's" helm had been put hard-a-starboard it would have had any effect either to check or change the movement of the "Rickmers." The argument in behalf of the respondent, based upon testimony of expert witnesses, assumes that it would have been possible for the "Stimson" to have used her sails in a manner to have forced her to swing on her cable inshore, so that the "Rickmers" might have passed without colliding. This, however, is only a suggestion of

a mere possibility. To be fair, the "Stimson" cannot be convicted of a fault upon any theory which ignores the obvious hazard of any attempt to set her sails at a time when the wind was blowing with such force as to drive the "Rickmers," without sails, and against the resistance of her anchors. If the "Stimson's" sails had been set and filled for the purpose of changing her position while the gale continued, in which direction would she have moved, and where would she have fetched up? Unless an intelligent answer to this inquiry can be given, there can be no basis whatever for supposing that the "Stimson" could have changed her position without increasing instead of diminishing the danger to which she was exposed."

(Printed Record, pp. 571-572.)

Upon the appeal of the "Rickmers," the judgment of the District Court should be affirmed.

Respectfully submitted,

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Proctors for Appellee.